

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
2014 Quadrennial Regulatory Review – Review of	)	MB Docket No. 14-50
the Commission’s Broadcast Ownership Rules and	)	
Other Rules Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996	)	
	)	
2010 Quadrennial Regulatory Review – Review of	)	MB Docket No. 09-182
the Commission’s Broadcast Ownership Rules and	)	
Other Rules Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996	)	
	)	
Promoting Diversification of Ownership	)	MB Docket No. 07-294
In the Broadcasting Services	)	
	)	
Rules and Policies Concerning	)	MB Docket No. 04-256
Attribution of Joint Sales Agreements	)	
In Local Television Markets	)	

To: The Commission

**REPLY TO OPPOSITIONS TO, AND IN SUPPORT OF, PETITIONS FOR RECONSIDERATION OF  
NEXSTAR BROADCASTING, INC. AND THE NATIONAL ASSOCIATION OF BROADCASTERS**

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## **Introduction**

Pursuant to 47 C.F.R. Section 1.429 of the FCC's rules,<sup>1</sup> Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, hereby submits this Reply to Oppositions to,<sup>2</sup> and in support of, the Petitions for Reconsideration filed by Nexstar Broadcasting, Inc.<sup>3</sup> ("Nexstar") and the National Association of Broadcasters<sup>4</sup> ("NAB", and together with Nexstar, "Petitioners") seeking reconsideration of the Commission's 2014 Quadrennial Regulatory Review Order.<sup>5</sup> Retaining outdated broadcast ownership rules, while ignoring the technological advancements of the past decade, defies the purpose of Congress's mandate that the Commission reexamine and justify its broadcast ownership rules every four years.<sup>6</sup> As the Petitioners ably point out, Congress acknowledged that the competitive environment facing broadcasters was likely to change, and it intended for the Commission to evaluate these changes and determine whether the

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<sup>1</sup> Sinclair understands the Commission's rules permit all interested parties to submit replies to oppositions and in support of petitions for reconsiderations of general rulemaking proceedings. In any event, Sinclair has an interest in this proceeding and, to the extent necessary, requests that the Commission accept and consider this submission as informal comments.

<sup>2</sup> *2014 Quadrennial Regulatory Review, 2010 Quadrennial Review, Promoting Diversification of Ownership in the Broadcasting Services, Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 ("2014 Quadrennial Regulatory Review"), Opposition to Petitions for Reconsideration, filed by Office of Communications, Inc., of the United Church of Christ, et al. ("UCC") (filed Jan. 24, 2017) ("UCC Opposition"); *2014 Quadrennial Regulatory Review*, Opposition to Petitions for Reconsideration, filed by American Cable Association ("ACA", and together with UCC, "Opposition Commenters") (filed Jan. 24, 2017) ("ACA Opposition").

<sup>3</sup> *2014 Quadrennial Regulatory Review*, Petition for Reconsideration of Nexstar Broadcasting, Inc. (filed Dec. 1, 2016) ("Nexstar Petition").

<sup>4</sup> *2014 Quadrennial Regulatory Review*, Petition for Reconsideration of the National Association of Broadcasters (filed Dec. 1, 2016) ("NAB Petition", and together with the Nexstar Petition, the "Petitions").

<sup>5</sup> *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864 (2016) ("Order").

<sup>6</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199 § 629, 118 Stat. 3 (2004).

rules were still necessary and in the public interest.<sup>7</sup> However, the Order not only unjustifiably retains certain antiquated broadcast ownership rules without properly considering today's competitive realities, but in some cases makes the rules more stringent without any legitimate evidentiary basis for doing so.

As detailed below, Opposition Commenters simply repeat the same unsupported arguments of the Commission, without disputing the facts raised by the Petitioners. Further, contrary to the arguments made by UCC, the Commission should not use the spectrum auction as an excuse for failing to address the dramatic changes to, and the competitive realities of, the broadcast marketplace as it exists today.<sup>8</sup> There will always be potential new developments, whether due to technological advances, new entrants, or otherwise that may impact Commission orders. If the Commission always delayed action in anticipation of what might happen sometime in the future, nothing would get done. Sinclair therefore respectfully requests that the Commission reconsider the Order and grant the relief requested in the Petitions. Specifically, Sinclair urges the Commission to (i) eliminate or substantially relax the local ownership rules (including elimination of the Eight Voices Test and the Top-Four Rule (each, defined below)), (ii) reverse its decision to attribute TV Joint Sales Agreements ("JSAs"), and (iii) repeal the newspaper-broadcast cross-ownership rule ("NBCO Rule").

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<sup>7</sup> See, e.g., Nexstar Petition at 2.

<sup>8</sup> UCC Opposition at ii, 3. And, in any event, UCC mischaracterizes the Order in this regard. The FCC found that it would be premature to change its rules *in anticipation of what UCC predicted would be the effects of the auction* on minority and female ownership until the FCC had a chance to assess the impacts of auction, not that it could not change *any* of its rules before then. See Order, ¶¶ 2, 74, 81. This is evidenced by the fact that the possible impact of the auction did not deter the FCC from tightening its rules with respect to JSA attribution, SSAs and newspaper cross-ownership.

## **Discussion**

### **1. The FCC should eliminate or substantially relax its local ownership rules.**

The Commission's local ownership rules, which prohibit ownership of more than one station where there are less than eight independent "voices" in the market ("Eight Voices Test") and limit a licensee's ownership to one top-four network-affiliated station in a market ("Top-Four Rule"), do not further the Commission's goals of localism, competition, or diversity.

Whatever worth they may have had when originally enacted decades ago, they now only serve to hinder broadcasters' ability to compete in today's dynamic media marketplace, where their MVPD and internet competitors do not face analogous FCC ownership restrictions.

The Commission should eliminate the Eight Voices Test because the record is devoid of evidence to justify its stated purpose. The Order asserts that retention of the rule is necessary to maintain the competition needed "to improve [stations'] programming, including increased local news and public interest programming."<sup>9</sup> However, the FCC provides no evidence to support this assertion. Instead, as the NAB points out, the FCC ignored studies to the contrary that actually show that dual ownership leads to increased news and public interest programming.<sup>10</sup> The Commission's decision to ignore this relevant evidence was a material error or omission warranting reconsideration of the Order.<sup>11</sup>

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<sup>9</sup> Order ¶ 56.

<sup>10</sup> See, e.g., Kevin W. Caves and Hal J. Singer, *An Economic Analysis of the FCC's Eight Voices Rule* (July 19, 2016), attached to Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, MB Docket Nos. 14-50 and 09-182 (July 19, 2016).

<sup>11</sup> See Order, Pai Dissent at n.112 (explaining in detail that "this study merely provides additional empirical support for arguments that the National Association of Broadcasters (NAB) has advanced throughout the 2010 and 2014 Quadrennial Reviews. See, e.g., NAB FNRPM Comments at 39, 55 (arguing that the eight-voices test is 'arbitrary' and 'makes no sense'). As such, the Commission may not simply disregard it, and the authority that the Order relies upon for doing so is inapposite," and noting that "the Caves & Singer Study was submitted weeks

Further, the Commission cannot plausibly argue that cable, satellite and the Internet do not provide robust competition in both programming and advertising, rendering arbitrary any competition-based need for the Eight Voices Test.<sup>12</sup> While the Commission contends that these entities do not meaningfully cover local issues, it offers no evidence to support this conclusion. In fact, the record in this proceeding shows just the opposite.<sup>13</sup> Accordingly, due to the robust competition from these non-broadcast sources and the public interest benefits of dual ownership described in detail throughout the record and in the Petitions, the Commission should eliminate the Eight Voices Test.

For many of the same reasons, the Commission should also eliminate the Top-Four Rule. The FCC's sole explanation for retaining the current rule is its "belief" that retaining the current local ownership rules will lead to increased competition among local rivals and therefore better serve the public interest.<sup>14</sup> But there is no evidence that a combination among top-four stations in the same market would harm competition. Broadcasters will always have the incentive to make programming decisions that they think will best serve their consumers and the public

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before this Order was adopted, not the day of adoption."). The Commission's contention that "consideration of this extremely late-filed study would cause undue delay" deserves little deference, considering how long it took the FCC itself to complete the 2010 quadrennial review. *See* Order at n.147.

<sup>12</sup> *See 2014 Quadrennial Regulatory Review*, Comments of Sinclair (filed Aug. 6, 2014) at 9-10 ("Sinclair 2014 Comments") (noting that MVPDs are using interconnects to compete directly with local TV stations for video advertising sales, Internet services such as Google are the largest advertising sales outlets of all and provide super-targeted local advertising, and both also compete in programming, with news programming and original series.).

<sup>13</sup> Sinclair 2014 Comments at 4 (noting that, "among a review of the top 15 websites by popularity, none were local TV station sites") (citing Top 15 Most Popular News Websites, EBIZ MBA, <http://www.ebizmba.com/articles/news-websites> (last visited August 5, 2014)). Note that current review of this source confirms this fact remains applicable today. The Commission seems to be unaware not only of local on-line news sites, but also of local cable offerings, such as local sports networks and local public interest programs.

<sup>14</sup> Order ¶ 44.

interest, whether they are competing with other local stations or any other video source.<sup>15</sup> In fact, as the Petitions point out, permitting more top-four duopolies would benefit consumers by, for example, leading to increased local news.<sup>16</sup>

In addition, the ACA's argument that eliminating the Top-Four Rule will result in higher retransmission consent fees is exaggerated and misleading.<sup>17</sup> The statistics upon which the ACA relies to criticize rising retransmission fees ignore the fact that due to earlier government regulations, broadcasters have only recently been permitted to receive any cash compensation for their valuable programming. Therefore, though the increase in rates may appear dramatic when looked at in isolation, in reality it simply reflects a market correcting years of artificially repressed rates.<sup>18</sup> Even now, the retransmission fees broadcasters have been able to attain remain significantly below the value that broadcasters deliver as compared to the fees paid for other programming.<sup>19</sup>

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<sup>15</sup> As Nexstar pointed out in its comments, "[B]roadcasters are competing for the very revenues necessary to continue [to serve local communities] with an over burgeoning number of competitors that seems to grow weekly. Yet, it is this same competitive media environment that motivates television broadcasters to provide viewers with the best possible programming. Nexstar's stations compete for audience share across the entire panoply of entertainment options available solely on the popularity and quality of their programming because popularity and quality of its stations' programming has a direct effect on the advertising rates Nexstar can charge its advertisers and the revenues Nexstar can earn therefrom. If Nexstar shirks its programming obligations, its revenues will be negatively affected." *2014 Quadrennial Regulatory Review*, Comments of Nexstar Broadcasting, Inc. (filed Aug. 6, 2014) at iii-iv.

<sup>16</sup> Nexstar Petition at 9 (citing Nexstar Comments at 13).

<sup>17</sup> ACA Opposition at 5-6.

<sup>18</sup> These regulations effectively gave MVPDs monopoly power to control their access to programming and rates. The facts that retransmission consent rates started at zero, and that it takes time to change a long-standing market, are the reasons why rates have increased in recent years, not the negotiating power of television broadcasters.

<sup>19</sup> See Sinclair Notice of Ex Parte Communication, MB Docket Nos. 09-182 and 10-71 (filed Feb. 26, 2014) ("Sinclair Ex Parte") ("although almost 40% of television viewing is of broadcast signals, according to SNL Kagan broadcasters received only 9.5% of the basic cable fees in 2013 and are projected to grow at less than 1% of basic cable fees each year, to only 12% in 2016. And those figures are the percentage of basic cable fees, not including premium networks and

And, in pointing the finger at broadcasters, the ACA doth protest too much. The ACA neglects to mention that the MVPDs that serve the overwhelming majority of subscribers are large, recently consolidated companies that are far from lacking leverage in retransmission consent negotiations and do not need the government's thumb on their side of the scale.<sup>20</sup> The ACA's self-serving arguments thus strain credulity and rely on obvious logical fallacy. Even if ACA's concerns had any merit—and they do not—resolution of such arguments is best left to the Department of Justice, not the FCC.

In sum, neither the Eight Voices Test nor the Top-Four Rule has a place in today's competitive video marketplace. These restrictions are not reasonably tailored to advance the Commission's stated policy goals and, in fact, deprive broadcasters and viewers of the benefits and efficiencies that duopolies have been proven to create. The lopsided application of such ownership restrictions to broadcasters in the absence of analogous Commission restrictions on other media entities similarly serves to disadvantage broadcasters without any countervailing benefit to the public. For all of these reasons, the Commission should reconsider the Order and eliminate the restrictions on local broadcast ownership.

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tiers.”). The ACA also notably omits the fact that retransmission consent fees account for a mere 3% of MPVD programming costs. *See* Comments of Nexstar Broadcasting, Inc., MB Docket No. 15-216 (Dec. 1, 2015) (“Nexstar 2015 Retrans Comments”) (citing Haney, Hance, *Repeal Satellite Television Law*, The Technology Liberation Front, Mar. 4, 2014, <https://techliberation.com/2014/03/04/repeal-satellite-television-law>).

<sup>20</sup> *See, e.g.*, Sinclair Ex Parte (noting that, even in 2014 “[t]he top four MVPDs in this country serve 65% of all video homes, and the top 10 serve 86% of such homes.” The cable industry's continuing consolidation since then further bolsters this point.); *see also* 2010 *Quadrennial Regulatory Review, Promoting Diversification of Ownership in the Broadcast Services*, MB Docket Nos. 09-182, 07-294, Comments of Sinclair Broadcast Group, Inc. (filed Mar. 5, 2012) (“Sinclair 2012 Comments”) at 19-20. These comments were incorporated into the Sinclair 2014 Comments by reference.

## 2. The FCC erred in adopting new rules to attribute TV JSAs.

In addition to rubber-stamping the existing ownership rules, the Commission adopted new, more stringent ownership rules when it made TV JSAs attributable. Because the Commission's authority is always tethered by the public interest, its failure to conduct a public interest review before attributing TV JSAs was a material error or omission. The ACA is mistaken when it claims that the Commission was not required to consider whether "tightening of the local television rule [is] in the public interest."<sup>21</sup> This position is plainly inconsistent with Section 303 of the Communications Act, which requires that all exercises of the Commission's authority be subject to "public convenience, interest, or necessity."<sup>22</sup> Additionally, the ACA misconstrues the Third Circuit's holding in *Prometheus III*.<sup>23</sup> There, the court vacated the JSA attribution rule, explaining that, [a]ttribution of television JSAs modifies the Commission's ownership rules by making them more stringent. And, unless the Commission determines that the preexisting ownership rules are sound, *it cannot logically demonstrate that expansion is in the public interest*.<sup>24</sup> Thus, even a reasonable determination that the existing ownership rules remain necessary in the public interest—and Sinclair maintains that the FCC's determination in the Order was not reasonable—would not endow the Commission with *carte blanche* authority to tighten the ownership limits without also demonstrating that such "expansion is in the public interest."<sup>25</sup>

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<sup>21</sup> ACA Opposition at 20.

<sup>22</sup> 47 U.S.C. § 303.

<sup>23</sup> ACA Opposition at 20-21; *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3rd Cir. 2016) ("*Prometheus III*").

<sup>24</sup> *Prometheus III* at 58 (emphasis added); *see also Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3d Cir. 2004) ("*Prometheus I*") ("no matter what the Commission decides to do to any particular rule—retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis.").

<sup>25</sup> *Prometheus III* at 58.

However, instead of undertaking the requisite public interest review, the Commission wholesale dismissed record evidence demonstrating the public benefits of JSAs, deeming it “irrelevant” to the decision to equate certain JSAs with ownership.<sup>26</sup> Contrary to the ACA’s claims, the Commission did not “consider[] and reject[]” such evidence. Rather, it flatly *ignored* the evidence; evidence that resoundingly extolled the benefits of JSAs, and cautioned that the operational costs of all stations would dramatically increase and stations operated pursuant to JSAs would be pushed from a positive to a negative broadcast cash flow if JSA arrangements were terminated.<sup>27</sup> And UCC’s attempt to undermine the public interest benefits of JSAs by claiming many JSAs result in improper programming influence because they result in identical news programming on multiple stations in the same market is similarly misleading as it implies, without evidence, that JSA-operated stations would have had the resources to produce *any* news programming at all in the absence of the JSA arrangement.<sup>28</sup>

Worse yet, the Commission failed to present countervailing evidence in the Order that would outweigh the public interest benefits of JSAs, resting instead on the hypothetical and

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<sup>26</sup> See Order ¶ 62 (incorporating by reference the rationale it used in its previous attempt to attribute JSAs, *see* Report and Order, 29 FCC Rcd 4371, 4538 ¶ 358 n.1105 (2014) (“JSA Order”)).

<sup>27</sup> As Chairman Pai pointed out, “the record is replete with evidence that JSAs promote localism and diversity. JSAs help television stations pay for services that we should want broadcasters to provide. They enable new entrants and diverse voices to participate in the broadcast industry. And they allow television stations to remain financially viable instead of going out of business.” JSA Order at 4592 (Pai Dissent).

<sup>28</sup> UCC Opposition at 9. As Sinclair has consistently noted, “the allegations assume that news sharing displaces an independent newscast. In fact, in many if not most cases, news sharing results in a new newscast that otherwise would not exist at all. In other cases, it improves the quality of the newscast for both stations involved, because producing local news is inherently a high fixed cost activity with relatively low marginal cost for additional output.” Sinclair 2012 Comments at 7; *see also id.* at 8 (“The notion that running the same newscast at two different time slots is somehow bad for viewers is uninformed opinion at best. Not every household chooses to subscribe to cable service or owns a DVR. Making a newscast available at different times makes it accessible to more people.”).

speculative fear of undue influence over programming.<sup>29</sup> Indeed, the GAO’s Media Ownership Report concluded that the Commission failed to adequately collect data to understand how broadcaster agreements were being used and the potential impacts with respect to media ownership rules and the corresponding policy goals of competition, localism, and diversity.<sup>30</sup> Notably, the ACA itself concedes that the Commission failed to undertake a public interest review of JSA attribution when it erroneously asserts that such “failure to do so was not material error or omission.”<sup>31</sup> Accordingly, because the FCC ignored considerable evidence as to the benefit of JSAs and did not provide conflicting evidence of their harms or show how attributing JSAs would be in the public interest, but instead relied on speculation about potential harms, the Commission should reconsider and reverse its decision to attribute TV JSAs.

### **3. The NBCO Rule only harms newspapers already struggling to compete and therefore should be eliminated.**

The Commission cannot reasonably ignore the myriad ways the media marketplace has changed since the NBCO Rule was implemented more than 40 years ago. As the News Media Alliance points out in its comments in support of the NAB Petition, “[t]oday’s media markets are literally flooded with information from digital platforms, [MVPDs], digital publishers, and more

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<sup>29</sup> See ACA Opposition at 23 (“The Commission . . . has already considered and rejected the argument that its attribution decision should rest on evidence of actual detrimental influence or control.”); see also Order at 10055, Pai Dissent (“Back in 2014, the Commission based its decision on its hypothesis that a JSA allows one station to exert undue influence over another’s programming decision and operations. . . . [T]he Commission *still* cannot find a single case in which one station in a JSA has exercised undue influence over another station or influenced a single programming decision of another station.”).

<sup>30</sup> See Sinclair 2014 Comments at 11-12 (citing U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION: MEDIA OWNERSHIP - FCC SHOULD REVIEW THE EFFECTS OF BROADCASTER AGREEMENTS ON ITS MEDIA POLICY GOALS, U.S. Senate, GAO-14-558, available at <http://www.gao.gov/assets/670/664484.pdf> (June 2014)).

<sup>31</sup> ACA Opposition at 22.

broadcasters than existed in 1975.”<sup>32</sup> The NBCO Rule impedes much-needed investment in the newspaper industry, and denies newspapers and broadcasters efficiencies that only common ownership can make possible. Accordingly, Sinclair joins News Media Alliance and Cox Media Group in supporting NAB’s Petition for reconsideration and repeal of the NBCO Rule.<sup>33</sup>

### **Conclusion**

For the foregoing reasons, Sinclair urges the Commission to reconsider the Order and eliminate or substantially relax its local television ownership rules, including the Eight Voices Test and the Top-Four Rule, reverse its decision to attribute JSAs, and repeal the NBCO rule.

Respectfully submitted,

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<sup>32</sup> 2014 *Quadrennial Regulatory Review*, Comments of the News Media Alliance in Support of NAB Petition for Reconsideration (filed Jan. 24, 2017) (“NMA Comments In Support”) at 2.

<sup>33</sup> NMA Comments in Support; 2014 *Quadrennial Regulatory Review*, Comments of Cox Media Group, LLC in Support of NAB Petition for Reconsideration (filed Jan. 24, 2017).

## CERTIFICATE OF SERVICE

I, Jessica T. Nyman, hereby certify that a copy of the foregoing “**REPLY TO OPPOSITIONS TO, AND IN SUPPORT OF, PETITIONS FOR RECONSIDERATION OF NEXSTAR BROADCASTING, INC. AND THE NATIONAL ASSOCIATION OF BROADCASTERS**” was sent via First Class Mail, postage prepaid, this 3<sup>rd</sup> day of February, 2017, to the following:

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